## REASON FOR GRANTING THE WRIT

IN LIGHT OF THE CONFLICT BETWEEN THE FOURTH CIRCUIT'S RULING AND THE LAW IN OTHER CIRCUITS, THE COURT SHOULD ADDRESS FOR THE FIRST TIME WHETHER WILDLY INCONSISTENT STATEMENTS ARE EVIDENCE OF PRETEXT IN DISCRIMINATION CASES.

The federal Courts of Appeal have consistently ruled that an employer's inconsistent statements can constitute evidence that its reasons for taking a discriminatory action are false and pretextual.[3] See Dominguez-Cruz v. Suttle Caribe, 202 F.3d 424, 432 (1st Cir. 2000)("A company may have several legitimate reasons to dismiss an employee. But when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual."); Thurman v. Yellow Freight Systems, Inc., 90 F. 3d 1160, 1167 (6th Cir. 1996)("An employer's changing rationale for making an adverse employment decision can be evidence of pretext."); EEOC v. Ethan Allen Furniture Orleans Div., 44 F.3d 116, 120 (2d Cir. 1994)([When justifications change over time,] a reasonable juror could infer that the explanations . . . given at trial were pretextual, developed over time to counter the evidence suggesting age discrimination uncovered by the state investigation."); Kobrin v. Univ. of

[3]Even the Fourth Circuit's prior rulings are in conflict with the decision challenged here. See EEOC v. Sears Roebuck & Co., 243 F.3d 846, 852-53 (4th Cir. 2001)("Indeed, the fact that Sears has offered different justifications at different times for its failure to hire Santana is, in and of itself, probative of pretext.").

Minnesota, 34 F.3d 698, 703 (8th Cir. 1994)("Substantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext."); Castleman v. Acme Boot Co., 959 F.2d 1417, 1422 (7th Cir. 1992)("A jury's conclusion that an employer's reasons were pretextual can be supported by inconsistencies in or the unconvincing nature of the decisionmaker's testimony.").[4]

In contrast, the Fourth Circuit in this case has radically departed from the precedents of its sister courts (and its own precedents) by finding that a plaintiff must meet a higher standard to show pretext – namely, direct contradictions between the managers' statements. As this Court recognized in McDonnell Douglas v. Green, discrimination usually has to be proven by circumstantial evidence because defendants strive to conceal it. 411 U.S. 792 (1973). Most of the time, even human beings with discriminatory intentions do not make statements that flatly contradict themselves. To require a plaintiff to prove that this has happened in order to survive summary judgment will severely curtail the number of genuine cases of discrimination that properly should be heard and will

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[4]In this instant case, three male federal managers gave multiple inconsistent reasons for denying Ms. Baldwin a promotion. Where only two reasons are given, the courts have sometimes held this to be insufficient to send the question to the jury. See Aragon v. Republic Silver State Disposal, 292 F.3d 654, 661 (9th Cir. 2002) ("We do not infer pretext from the simple fact that Republic had two different, although consistent, reasons for laying off Aragon."); Johnson v. Nordstrom, Inc., 260 F.3d 727, 733-34 (7th Cir. 2001)(where decisions merely supplemented at trial and not shown to be contradictory, summary judgment on the issue of pretext is warranted).

undermine the letter and the policy of Title VII of the Civil Rights Act of 1964.

The Fourth Circuit's ruling does violence to a generally accepted understanding that when managers offer wildly different justifications for their conduct when they are accused of discrimination, that a jury should have the opportunity to assess whether the differences undermine the defendant's asserted legitimate non-discriminatory reasons. Here, the Fourth Circuit has abused the summary judgment process by resolving disputed questions of fact and usurping the prerogative of the jury.

The Supreme Court should clearly define a rule of law clarifying that managers cannot simply make up reasons for their discriminatory actions and be unchallenged. At the very least, a female plaintiff who has been the victim of such practices is entitled to have a jury scrutinize the self-serving, inconsistent, and insincere reasons of her male supervisors.

Respectfully submitted,

September 20, 2005

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# APPENDIX

## TABLE OF CONTENTS

**Appendix Page**

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 04-1625

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**[ENTERED: JUNE 22, 2005]**

BRENDA J. BALDWIN,

Plaintiff – Appellant,

versus

GORDON ENGLAND, Secretary of the Navy, United States Department of the Navy,

Defendant – Appellee.

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Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (CA-02-2066-AW)

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Argued: May 25, 2005 Decided: June 22, 2005

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Before LUTTIG and SHEDD, Circuit Judges, and Eugene E. SILER, Jr., Senior Circuit Judge of the United

States Court of Appeals for the Sixth Circuit, sitting by designation.

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Affirmed by unpublished per curiam opinion.

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**ARGUED:** Joseph Davis Gebhardt, GEBHARDT & ASSOCIATES, L.L.P., Washington, D.C., for Appellant. John Walter Sippel, Jr., Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF:** Charles W. Day, Jr., GEBHARDT & ASSOCIATES, L.L.P., Washington, D.C., for Appellant. Thomas M. DiBiagio, United States Attorney, Baltimore, Maryland, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Plaintiff-appellant Brenda J. Baldwin filed a complaint in federal district court against defendant-appellee Gordon England, Secretary of the Navy, alleging that she was denied a promotion based on her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The district court granted summary judgment in favor of the defendant. For the reasons that follow, we affirm.

I.

Baldwin has been employed by the Navy for twenty-three years. J.A. 514. From 1996 to 2001, she worked at the GS-11 level as a Logistics Management Specialist in the Cartridge Actuated Device/Propellant Actuated Device (CAD/PAD) Department, within the CAD Acquisition and Logistics Division, Logistics Branch, at the Naval Surface Warfare Center in Indian Head, Maryland. Id. Her position was at full performance level, which means there was no room within the position for advancement. Id. at 515.

In her position, Baldwin had two possible means of acquiring a promotion: first, she could seek a promotion competitively, by applying for an open position at a higher grade level; and second, she could seek to be promoted noncompetitively, through an "accretion of duties" promotion. See 5 C.F.R. § 335.103. An accretion of duties promotion occurs when an employee has assumed sufficient additional duties and responsibilities to justify dissolving her current position and creating a new position for her at a higher

grade that includes both the original responsibilities of the old job and the additional duties the employee has undertaken. J.A. 329, 382-83. Baldwin sought such a promotion in March 2000. J.A. 69.

In June 2000, Baldwin learned that two of her male GS-11 co-workers, Mike Rutledge and Greg Knapp, had been given accretion of duties promotions. J.A. 516, 72. Both Rutledge and Knapp worked in the CAD/PAD Department as Ordnance Equipment Specialists. J.A. 397, 403. Rutledge had the same supervisors as Baldwin; one of those supervisors helped him obtain a promotion by rewriting his position description to reflect his new duties. J.A. 516.

Each time Baldwin requested an accretion of duties promotion to a GS-12 promotion during 2000, she was told she could not be promoted; she alleges she was initially told that there was a pending reduction-in-force (RIF) that had resulted in a hold on all personnel actions. J.A. 71. In litigation, her supervisor testified that he told her that the RIF did not affect her because she was at her full performance level and there were no open GS-12 positions for which she could apply. J.A. 289, 296-97. One of Baldwin's higher level supervisors also told her that she was not performing her duties, J.A. 75, and her supervisors later said that she could not be promoted because she was performing only at a GS-11 level and there was no GS-12 work available. J.A. 323, 77. Baldwin has since transferred to a GS-12 position elsewhere in the Navy. J.A. 516.

Because the Navy denied her a promotion, Baldwin filed an EEO administrative complaint. J.A. 359. Before a decision was issued on her EEO complaint, she filed suit in the district court alleging gender discrimination in violation of Title VII. Id. The district court granted summary judgment in favor of the Navy on the grounds that Baldwin had failed to establish a prima facie case of discrimination and that, even if she had established a prime facie case of discrimination, Baldwin did not create a genuine issue of fact as to whether the Navy's asserted non-discriminatory reasons were pretextual. J.A. 521-23.

II.

We review the district court's grant of summary judgment de novo, viewing facts in the light most favorable to the nonmoving party. Evans v. Technologies Applications & Service Co., 80 F.3d 954, 958 (4th Cir. 1996). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.; Fed. R. Civ. P. 56(c).

A plaintiff-employee seeking to prove that she was denied a promotion because of her sex must either provide "direct evidence of a purpose to discriminate or circumstantial evidence of sufficiently probative force to raise a genuine issue of material fact." Evans, 80 F.3d at 959. Baldwin seeks to prove discrimination based on circumstantial evidence using the three-step framework established by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the McDonnell Douglas framework, the plaintiff must first prove a

prima facie case of discrimination. Evans, 80 F.3d at 959. A prima facie case requires that the plaintiff demonstrate that "(1) she is a member of a protected class; (2) her employer had an open position for which she applied or sought to apply; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." Id. at 959-60. If a plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant-employer to present a legitimate, non-discriminatory reason for the denial of a promotion. Id. at 959. If the employer does so, the burden shifts back to the employee to demonstrate that the purported non-discriminatory reason was mere pretext for discrimination. Id.

The Navy alleges that Baldwin has failed to prove the latter three prongs of her prima facie burden. The district court rested its grant of summary judgment in large part on its conclusion that Baldwin had failed to apply for any position. J.A. 521. We need not review this conclusion, however. We conclude that even if Baldwin did present a prima facie case, the district court correctly concluded that she failed to demonstrate that her employer's non-discriminatory explanation for denying her a promotion was pretext.

Baldwin relies exclusively on the Navy's promotion of Rutledge and Knapp in 2000 as the circumstance giving rise to an inference of discrimination. Appellant's Br. at 28-30. According to Baldwin, both men were similarly situated to her. J.A. 441-42. Rutledge was a GS-11, was supervised by the same three supervisors as Baldwin, and was in the

same branch of the CAD/PAD Department as Baldwin. J.A. 73, 403. Knapp was likewise a GS-11, had the same third-line supervisor as Baldwin, and was in the CAD/PAD Department, although in a different branch. J.A. 73, 397. Baldwin alleges that the Navy's differential treatment of her and her two male co-workers supports an inference of sex discrimination.

The Navy rebuts Baldwin's allegation by explaining the men's promotions in light of the RIF that occurred in 2000. While Rutledge was promoted after the RIF occurred, his paperwork for promotion was submitted before the announcement of the RIF. J.A. 72-73, 307-08, 414. Knapp's promotion was done as part of a position description review that was mandated by contract, through which he identified substantial additional responsibilities he had acquired. J.A. 358, 414. Thus, the promotions of Rutledge and Knapp, unlike Baldwin's requested promotion, were not barred by the RIF. The Navy also notes that Rutledge and Knapp each held a different position than Baldwin did and performed different duties. J.A. 322 ("[Rutledge and Knapp's] equipment specialist position has different duties, supervisory controls and complexity than the logistics management specialist position that Ms. Baldwin is in.").

Baldwin bears the burden of presenting evidence sufficient to permit a judgment that the Navy's explanations are a pretext for discrimination. But Baldwin does not appear to dispute that a RIF occurred, or to attempt to discredit the Navy's explanations of why Rutledge and Knapp were not affected by the RIF, as Baldwin was. Instead, she only

alleges that she, Rutledge, and Knapp generally performed similar jobs, and that the fact that her supervisors provided various explanations to her of why she could not be promoted demonstrates that those explanations are pretext. See EEOC v. Sears Roebuck & Co., 243 F.3d 846, 852-53 (4th Cir. 2001) ("Indeed, the fact that Sears has offered different justifications at different times for its failure to hire Santana is, in and of itself, probative of pretext.").

Neither of these allegations creates a genuine issue of material fact concerning pretext. It is undisputed that Rutledge and Knapp had different job titles than Baldwin, and Baldwin offers no evidence other than her unsupported allegation to permit a conclusion that their duties were nonetheless similar. See Evans, 80 F.3d at 960 (holding that a plaintiff-employee's "unsubstantiated allegations and bald assertions" are insufficient to rebut the employer's non-discriminatory justification for an employment decision). Absent proof that their duties were the same, the mere fact that their work was GS-12 level does not disprove the Navy's contentions that Baldwin's work was not GS-12 level and that no GS-12 level work was available for her to perform. Nor do the varying explanations offered by her supervisors to explain their refusal to promote Baldwin suffice, under these circumstances, to demonstrate pretext. The explanations that Baldwin alleges she received from her superiors do not contradict each other, but rather reflect various consistent reasons that she could not be promoted. See J.A. 71 (Baldwin alleges that she was told that the RIF barred all personnel actions); J.A. 289 (Baldwin's supervisor explains that while personnel

actions were on hold, that hold had no effect on Baldwin because she was ineligible for a promotion in any event). In contrast, the store manager in Sears Roebuck & Co., on which Baldwin relies, admitted that she had lied to the member of the company investigating the failure to hire the plaintiff-employee and that she had purposely withheld the true explanation for her failure to hire from the EEOC. Sears Roebuck & Co., 243 F.3d at 850. Unlike the employer's dishonest representations in Sears Roebuck, the Navy's proffer of consistent, though varying, reasons that Baldwin could not be promoted fails to support an allegation that any of those reasons are false, much less that all of them are a pretext for discrimination.

Because the Navy has offered a legitimate reason for its failure to promote Baldwin in the face of promotions of male co-workers, and Baldwin has failed to offer sufficient evidence for a reasonable factfinder to conclude that the Navy's explanation is pretext, the district court correctly granted summary judgment in favor of the Navy.

## CONCLUSION

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**
**SOUTHERN DIVISION**

| | | |
|---|---|---|
| BRENDA J. BALDWIN | | |
| Plaintiff, | | |
| vs. | | Civil Action No. AW-02-2066 |
| GORDON R. ENGLAND | | |
| Defendant. | | |

**[ENTERED: March 31, 2004]**

**MEMORANDUM OPINION**

Plaintiff Brenda J, Baldwin has filed suit against Defendant Gordon R.- England, Secretary of the Navy (the "Navy") claiming gender or sex discrimination by failure to promote in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e and 1981a ("Title VII"). Pending before this Court are Plaintiff's Motion for Partial Summary Judgment [19] and Defendant's Cross-Motion for Summary Judgment [26]. The motions have been fully briefed and are ripe for review. The Court has reviewed the pleadings and determined that no hearing is necessary. *See* D. Md. R. 105(6). Upon careful consideration of the arguments in favor of, and in opposition to, the motions, this Court finds as follows.

## I. Factual Background

The following facts are uncontroverted. Plaintiff Baldwin has worked for the Navy for twenty-three years. From 1996 through 2001, Plaintiff worked as a GS-11 Logistics Management Specialist in the Cartridge Actuated Device/Propellant Actuated Device (CAD/PAD) Department, within the CAD Acquisition and Logistics Division, Logistics Branch, at the Naval Surface Warfare Center, Indian Head Division, Indian Head Maryland. Plaintiff's position was at full performance level: there was no room within the position for advancement.

Plaintiff had two avenues for obtaining a promotion: (1) by applying for a position with a higher grade level; and (2) accretion of duties[1] whereby a position is classified at a higher grade due to the imposition of additional duties and responsibilities. The Navy applied the following criteria for approving promotions through the accretion of duties: (1) the major duties of the employee's old position had to be absorbed into the new position; (2) the new position could have no known promotion potential; and (3) the additional duties of the new position could not adversely affect another encumbered position. In addition, funding had to be available. Finally, the Navy might require a desk audit to properly classify the position description. Employees who feel they merit an accretion of duties promotion may initiate the process by requesting a desk audit. A promotion

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[1] Accretion of duties was formerly termed "gradual accretion of duties" or "GAD."

through accretion of duties, however, is not an entitlement.

From 1991 to 2001, Stanley Chambers was Plaintiffs first-line supervisor; from 1996 to 2001, John Shumpert was her second-line advisor; and from 1996 to 2001, David Williams was her third-line supervisor. Mr. Chambers also supervised Catherine (Debbie) Bowie.

Plaintiff received positive performance appraisals from her supervisors. She received an "exceeds fully successful" rating in each element on her 1999/2000 performance appraisal. In addition, her 1999/2000 appraisal did not reflect any complaints or problems with Plaintiffs performance. Furthermore, Ms. Baldwin received performance awards for her work.

On or about June, 2000, Plaintiff learned that the Navy had promoted Mike Rutledge and Greg Knapp, two of her male GS-11 coworkers, through the accretion of duties process. Mr. Rutledge had the same first-line, second-line, and third-line supervisors as Plaintiff. Mr. Knapp had the same third-line supervisor as Plaintiff. Mr. Shumpert assisted Mr. Rutledge in obtaining a promotion by rewriting Mr. Rutledge's Position Description to reflect new duties and submitting it to Personnel in June 1999.

Ms. Bowie, a Logistics Management Specialist at grade level GS-11, approached Mr. Chambers several times and Mr. Shumpert at least twice to request a promotion to GS-12. Ms. Bowie eventually received a

promotion to GS-12 through the accretion of duties process after filing a grievance against her male managers.

Plaintiff asked Mr. Chambers about promoting her to a GS-12 position on several occasions in 2000, but, each time, she was told she could not be promoted.[2] Plaintiff, however, did not formally request a desk audit. Plaintiff eventually applied for, and received, a GS-12 position at the Washington Naval Yard.

Plaintiff filed suit claiming that the Navy unlawfully discriminated against Plaintiff on the basis of her gender and sex, in violation of Title VII, by denying her a promotion to a GS-12 Logistics Management Specialist Position. The parties have conducted discovery. Plaintiff filed a motion for partial summary judgment, and Defendant filed a cross-motion for summary judgment.

## II. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment will be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of

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[2] The Court recognizes that the record reflects some inconsistency in the reasons provided Ms. Baldwin. Plaintiff claims that she was given a different explanation each time she inquired into a promotion. In particular, she argues that she was told that she could not be promoted because she was at her full potential as a GS-11, because there was freeze on all personnel actions, and because of a lack of funding. These inconsistencies are also reflected in Defendant's testimony.

law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct 2505, 91 L. Ed. 2d 202 (1986); *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 214 (4th Cir. 1993); *Etefia* v. *East Baltimore Comm. Corp.*, 2 F. Supp. 2d 751, 756 (D. Md. 1998). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.'" *Celotex v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2543, 91 L. Ed. 2d 265 (1986) (quoting Fed. R. Civ. P. 1). The court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded to particular evidence." *Masson v. New Yorker Magazine*, 501 U.S. 496, 520, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991) (citations omitted). While the evidence of the non-movant is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation, of inferences. *See Deans v. CSX Transportation, Inc.*, 152 F.3d 326, 330-31 (4th Cir. 1998); *Beale v. Hardy*, 769 F.2d 213, 214 (4th. Cir. 1985).

In responding to a proper motion for summary judgment, the party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find for him or her. *Anderson*, 477 U.S. at 252; *Celotex*, 477 U.S. at 322-23; 10A Charles Alan Wright et al., Federal Practice and 4Procedure § 2729.1 (3d 1998). The non-movant must show that she has access to admissible evidence for presentation at trial. *Celotex*, 477 U.S. at 327. In the absence of contradictory evidence showing a genuine

dispute as to a material fact, the moving party is entitled to judgment as a matter of law. *See id.* at 317 (1986). For the purposes of summary judgment, a genuine dispute exists if a reasonable jury could return a verdict for the non-moving party. *Anderson,* 477 U.S. at 248 (1986). While the non-moving party must do more than merely raise some doubt as to the existence of a fact, the moving party ultimately bears the burden of demonstrating the absence of all genuine issues of material fact *See Matsushita Else. Indus. Co. v. Zenith Radio Corp.,* 475 U.S, 574, 537-88, 106 S. Ct 1548, 89 L. Ed. 2d 538 (1986).

**III. Discussion**

A plaintiff can establish discriminatory intent under Title VII in two ways: (1) through direct evidence of discriminatory animus, or (2) through the application of the burden-shifting analyses employed in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). Plaintiff Baldwin has not provided direct evidence, and, as a result, the Court's analysis will follow the *McDonnell Douglas* scheme. As such, Plaintiff must first establish *prima facie* case of discrimination, which creates an inference of discrimination. *See McDonnell Douglas,* 411 U.S. at 802. Once Plaintiff has demonstrated a *prima facie* case, the burden shifts to Defendant to rebut by providing "legitimate nonretalitory reasons for the adverse action." *Williams v. Cerberonics, Inc.,* 871 F.2d 452, 457 (4th Cir. 1989) (citing *Ross v. Communications Satellite Corp.,* 759 F.2d 355, 365 (4th Cir. 1985)). The burden then reverts to the employee to "establish by a preponderance of the evidence that the proffered reasons are pretextual." *Id.*

To this end, Plaintiff must prove that "the legitimate reasons offered by the agency were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Cerberonics*, 871 F.2d at 456. While the *McDonnell Douglass* framework involves a shifting back and forth of the evidentiary burden, Plaintiff, at all times, retains the ultimate burden of persuading the trier of fact that the employer discriminated in violation of Title VII. *See Burdine*, 450 U.S. at 253 (1981). Nevertheless, "the burden of establishing a prima facie case of disparate treatment is not onerous." *Id.*

In order to establish a *prima facie* case for disparate treatment through failure to promote, Plaintiff must demonstrate the following: (1) that she is a member of a protected class; (2) that there was a position for which she applied, or sought to apply; (3) that she was qualified for the job; and (4) that she was rejected under circumstances giving rise to an inference of unlawful discrimination. *Evans v. Technologies Applications and Serv., Co.*, 80 F.3d 954, 959-60 (4th Cir. 1996) (failure to promote; gender); *Amirmokri v. Baltimore Gas and Elec. Co.*, 60 F.3d 1126, 1129 (4th Cir. 1996) (failure to promote; national origin); *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994) (failure to promote; race). The first element is clearly met because Plaintiff is a woman. The remaining elements are not as clear cut and require the Court's attention.

Plaintiff maintains that she asked her supervisor, Mr. Chambers, about a promotion on numerous occasions in 2000, but was given various reasons why she could not be promoted. In response,

Defendant argues Plaintiff had two options for moving to the next GS-level: (1) applying to a position with a higher grade; and (2) requesting a desk audit and attempting to qualify for a promotion based on accretion of duties.[3] Defendant argues that since Plaintiff did not request a desk audit she failed to invoke the applicable procedures for a GAD promotion.[4] Plaintiff claims that Defendant's arguments are unpersuasive because Defendant has produced no evidence that the men who received accretion of duties promotions requested desk audits, and because Plaintiff testified that she did not believe a desk audit would be conducted fairly in light of the fact that other women had to file grievances in order to be promoted.[5]

The Fourth Circuit has made clear that "Title VII does not require a plaintiff to apply for a job when to do would be a futile gesture." *Brown v. McLean,* 159 F.3d 898, 903 (4th Cir. 1998) (citing *Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 368, 368 (1977)). The Fourth Circuit has further elaborated that "a plaintiff who has failed to apply for a job may still carry his burden of proof if he can demonstrate that 'he would have applied but for accurate knowledge of an employer's discrimination and that he would have

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[3] Plaintiff was not eligible for a traditional grade increase because the her position's

[4] Plaintiffs subsequent application for a position with a higher GS-12 level was successful.

[5] Plaintiff testified that she did not request a desk audit because Ms. Bowie had to file a grievance in older to receive her promotion Pl. Reply Ex. 5.

been discriminatorily rejected had he actually applied." *Id.* (citing *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir. 1990)). The Court is not persuaded by Plaintiffs claim that, based solely upon the fact that Ms. Bowie filed a grievance and received a promotion via accretion of duties, she felt that her application would be futile.[6] While Plaintiff claims that she was discouraged from requesting a desk audit because other women had filed grievances to receive promotions, Plaintiffs testimony focused on only *one* woman: Ms. Bowie. This Court is unpersuaded that one co-worker's experience is sufficient to create the perception that Plaintiff's application would be futile. In addition, the Court rejects Plaintiff's contention that Defendant's case is weakened because Defendant failed to provide evidence that the men who received promotions requested desk audits.

Indeed, as the Court indicated above, Plaintiff, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *See Burdine*, 450 U.S. at 253 (1981). Since Plaintiff had to establish why she did not request a desk audit - in other words, why she did not apply for the position in dispute - she maintained the burden of persuading the Court that desk audits were not necessary for accretion of duties promotions or that only women had to

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[6] In fact, the Court finds it necessary to note that Ms. Bowie's complaint *did not* include an allegation of sex discrimination. *See* Def. Reply Ex. 1 at 246.

request desk audits in order to be promoted.[7] This might have been accomplished by demonstrating that the men who received promotion were not required to request desk audits; Plaintiff has not provided the Court with such evidence. The Court concludes that since Plaintiff did not follow the proper protocol for applying for a GAD promotion and she has failed to provide sufficient reasons for not doing so under the "futile gesture" doctrine, Plaintiff has failed to establish a *prima facie* case of discrimination.[8]

Furthermore, assuming *arguendo,* that Plaintiff had established a prima facie case, this Court find that Defendant has advanced legitimate reasons for its actions. In particular, Defendant maintains that Plaintiff was not promoted because her duties had not changed so radically that her job and her positions description were not longer in sync, as required by the guidelines for accretion of duties promotions. Furthermore, Defendant contends that promotions through accretion of duties require that the Navy consider the potential impact on other similarly-situated individuals within the agency in order to avoid situations in which employees with the same

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[7] In *Barbour* v. *Browner,* the D.C. Court Circuit stated, "[e]vidence that the [government agency] invoked the desk audit requirement only when employees of an allegedly disfavored race sought promotions, for instance, might demonstrate that the agency was purposefully using the rule to cover up its discriminatory practices." 181 F.3d 1342, 1347 (D.C. Cir. 1999).

[8] Since Plaintiff has failed to establish the second element of a *prima facie* case of discrimination, the Court does not find it necessary to address the remaining elements.

positions and responsibilities have jobs with different grade levels. Finally, the Court notes that courts have recognized the need for employers to exercise a degree of autonomy in their business decisions. *See EEOC v. Clay Printing Co.*, 955 F.2d 936, 946 (4th Cir. 1992); *Pfeifer v. Lever Bros. Co.*, 693 F. Supp. 358, 364 (D. Md. 1987), *aff'd without op.* 850 F.2d 689 (4th Cir. 1989). Indeed, federal employment discrimination statutes are "not intended as a vehicle[s] for judicial review of business decisions." *Pfeifer*, 693 F. Supp. at 364. As such, business decisions need not be sound, and they only fall within the purview of Title VII when they are based upon a protected status. *See EEOC v. Flasher Co, Inc.*, 986 F.2d 1312, 1320 (10th Cir. 1992) (citation omitted). The Court believes that Defendant had various business-related reasons for not promoting Plaintiff.

Under the *McDonnell Douglas* framework, the burden now shifts back to Plaintiff to demonstrate that Defendant's non-discriminatory reasons are pretext. The Court does not believe Plaintiffs response meets this burden. Indeed, there is no showing on the record that the reasons advanced by Defendant were pretextual. Plaintiff was not similarly-situated to the two men who received promotions. Mr. Rutledge's promotion package was submitted prior to the 1999-2000 RIF that Defendant claims prevented consideration of Plaintiff for promotion. Furthermore, Mr. Knapp's job was entirely different from Plaintiff's and his promotion occurred during a Position Description Review - Plaintiff received the same review but it was found that her job duties did not require a promotion by accretion of duties.

Accordingly, Plaintiff's motion for partial summary judgment fails and the Court will grant Defendant's motion for summary judgment.

## IV. Conclusion

Plaintiff has failed to establish a *prima facie* case of discrimination because she did not apply for the promotion in question. Accordingly, this Court will deny Plaintiff's motion for partial summary judgment and grant Defendant's motion for summary judgment An order to this effect will follow.

March 31,2004
Date

/s/
Alexander Williams, Jr.
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**
**SOUTHERN DIVISION**

| | | |
|---|---|---|
| BRENDA J. BALDWIN | | |
| Plaintiff, | | |
| vs. | | Civil Action No. AW-02-2066 |
| GORDON R. ENGLAND | | |
| Defendant. | | |

**[ENTERED: March 31, 2004]**

**ORDER**

For the reasons stated in the accompanying Memorandum Opinion dated March 31st, 2003, IT IS, this 31st day of March, 2004, by the United States Court for the District of Maryland, ORDERED:

1. That Plaintiff's Motion for Partial Summary Judgment [19] BE and hereby the same IS, DENIED; AND;

2. That Defendant's Cross-Motion for Summary Judgment [26] BE, and hereby the same IS, GRANTED; AND;

3. That the Clerk of the Court CLOSE this case; AND;

4. That the Clerk of the Court transmit the Memorandum Opinion and Order to all counsel and parties of record

/s/
Alexander Williams, Jr.
United States District Judge